89-155

No. _____

Supreme Court
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MONTANA HORNER,

Petitioner,

v.

UNITED STATES PAROLE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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56 pgs

QUESTIONS FOR REVIEW

I. THE COERCED AND FRAUDULENTLY PROCURED WAIVER OF COUNSEL BY THE CASE MANAGER THE DAY BEFORE AS WELL AS THE DAY OF THE PAROLE HEARING FROM THE CONFINED AND INCOMMUNICADO PAROLEE WAS NOT DISSIPATED BY THE PAROLEE'S RESTATEMENT OF THE WAIVER BEFORE THE PAROLE COMMISSION.

II. PETITIONER, A PAROLEE WAS DENIED REASONABLE ACCESS TO ADVERSE INFORMATION BEFORE THE PAROLE HEARING IN VIOLATION OF 18 U.S.C. 4208(b) AND **U.S. DEPARTMENT OF JUSTICE v. JULIAN**, 108 S.CT. 1606, 1616 (1988).[1]

III. THE REMOVAL OF THE SPECIAL TERM OF PAROLE UNDER **BIFULCO v. UNITED STATES**, 447 U.S. 381 (1980), WAS NOT A "CASE SPECIFIC FACTOR" THAT EXCUSED REGULATION REQUIRED EARLY TERMINATION OF PAROLE.

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[1] The opinion below refers neither to the statute (18 U.S.C. 4208(b)) nor to **Julian**, the pertinent language of which was furnished to the court of appeal at oral argument and again in the petition for rehearing. (Pet. for Rehearing, p. 1 n. 1, p. 10 n. 11, p. 11).

TABLE OF CONTENTS

	Page
INTRODUCTION.	1
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
SUPPLEMENTAL STATEMENT OF FACTS	5
REASONS FOR ALLOWANCE OF THE WRIT	11
CONCLUSION.	30

TABLE OF AUTHORITIES

Cases	Page
Anderson v. U.S. Parole Com'n., 793 F.2d 1136 (9th Cir. 1986)	21
Bifulco v. U.S., 447 U.S. 381 (1980) .	26-28
Blackledge v. Allison, 431 U.S. 63 (1977)	11
Brewer v. Williams, 430 U.S. 387 (1977) .	15
Brown v. Illinois, 422 U.S. 590 (1975)	19-20
Dunaway v. New York, 442 U.S. 200 (1979)	20
Herman v. Claudy, 350 U.S. 116 (1956) . .	12
Lanier v. S. C., 106 S.Ct. 297 (1985) .	20
Machibroda v. United States, 368 U.S. 487 (1962)	12, 15
Marrow v. United States, 772 F.2d 525 (9th Cir. 1985)	12
Mayes v. Pickett, 537 F.2d 1080 (9th Cir. 1976)	12
Mistretta v. United States, 109 S.Ct 647 (1989)	2
Taylor v. Alabama, 457 U.S. 687 (1982)	19-20
U.S. DOJ v. Julian, 108 S.Ct. 1606 . .	21-23
United States v. Espinoza, 866 F.2d 1067 (9th Cir. 1988)	12
Wong Sun v. United States, 371 U.S. 471 (1963)	19, 20, 30

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Because of the improper interference with the right to counsel in the prison setting, petitioner, Montana Horner, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **Montana Horner v. United States Parole Commission**, No. 87-2989.

OPINION BELOW

The Opinion of the Court of Appeals affirmed the conviction and sentence of

petitioner and is officially reported at 870 F.2d 1489 (9th Cir. 1989). A copy of the Opinion is attached as Appendix A (App. A).

STATEMENT OF JURISDICTION

On 24 March 1989 the Court of Appeals entered judgment affirming the denial of an evidentiary hearing and the petition for a writ of habeas corpus challenging the waiver of counsel at the parole revocation hearing and other violations of parole laws. On 11 July 1989 a Petition for Rehearing and Suggestion for Rehearing En Banc was denied (App. A, 6465). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

STATUTES INVOLVED[2]

A federal parolee's right to counsel in a parole revocation hearing includes:

(B) opportunity for the parolee to be represented by an attorney retained by the parolee, or if he is financially unable to retain counsel, counsel shall be provided pursuant to section 3006(A) or, if he so chooses, a representative as provided by the rules and regulations, unless the parolee knowingly and intelligently waives such representation. 18 U.S.C. 4214(a)(2).

A confined parolee's right to information prior to a parole revocation hearing is:

(b) At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with . . . (2) reasonable access to a report or other document to be used by the [Parole] Commission in making its determination.

STATEMENT OF THE CASE

While in custody awaiting sentencing in San Diego, California, on a federal case, the

[2] These parole provisions were repealed by Pub. L. 98-473, Title II, § 218(a)(5), 98 Stat. 2027 (12 Oct. 84). The new federal sentencing guidelines and the abolition of parole apply only to offenses that occur after 1 November 1987 (See Mistretta v. United States, 109 S.Ct 647 (1989)); thus, the parole revocation here, which occurred in July 1985, is governed by the provisions then in effect.

petitioner was abruptly transferred to and held in lock-down at the U.S. Penitentiary, Lompoc, California, where he was coerced and deceived by the prison's "case manager" into waiving his right to counsel at the parole revocation hearing. The subject of the revocation was the same misconduct for which he was to be sentenced in federal district court in San Diego.

Petitioner challenges the deceitful denial of counsel, the failure to terminate his parole in 1981 and the lack of access to information in the parole hearing in July 1985. The federal district court in Arizona, where the petitioner was confined, had jurisdiction to issue a writ of habeas corpus. 28 U.S.C. 2241.

SUPPLEMENTAL STATEMENT OF FACTS[3]

On 3 April 1985 Horner was arrested and detained in the Metropolitan Correction Center (MCC) in San Diego. The Parole Commission directed that the petitioner be removed on 12 July 1985 from the MCC to the U.S. Penitentiary, Lompoc, California, for a unanticipated parole revocation hearing just four days later -- on 16 July 1985. Petitioner's removal to the penitentiary was unexpected. His counsel had been making efforts to schedule it after the San Diego sentencing hearing on his plea of guilty to the federal charge which was the principal basis of the parole revocation. (CR 3; ER 60-61). The Parole Commission had been on notice that the petitioner's attorney did not want

[3] The Court of Appeals opinion (App. A) provides a brief summary of the facts surrounding the improper waiver of counsel and lack of access to the adverse reports (App. A, 2817-2821). An amplification of the facts on these two issues is necessary both to evaluate the denial of an evidentiary hearing as well as the denial of the writ.

the petitioner transferred from San Diego before his scheduled sentencing on 26 August 1985. (CR 1:7; ER 7; CR 12, Ex. K; ER 114).

On the day petitioner Horner signed the purported "waiver of counsel" for the parole hearing, 15 July 1985[4] (CR 12, Ex. M; ER 116). Petitioner, seeking advice as to whether to postpone the hearing as his attorney had advised spoke briefly to his brother, a civil attorney, but the phone call was cut off. Attorney Horner was advised by petitioner that his case manager, Mr. Tennant, said that petitioner should have the parole revocation hearing or he would face a "two-month wait" in the penitentiary's "lock-up" (i.e., the worst

[4] The opinion of the panel correctly cites 15 July 1985 as the day of the conversation between the case manager and Horner (App. A. 2819), but erred in listing the date of the waiver as "July 5, 1985" (ibid.). The written waiver of counsel was executed on 15 July 1985 and was witnessed by the case manager (CR 13 Ex. L & M; ER 115-116), the same day petitioner was cut off on his phone call to his attorney brother and the case manager spoke with attorney Sevilla. More importantly, the opinion fails to state that the parole hearing occurred on 16 July 1985, a date when the case manager's actions and influence continued and when the parole hearing began.

prison accommodations). Petitioner further advised Attorney Horner that his case manager estimated that petitioner could expect as a result of the parole revocation hearing "24 to 36 months" set-off time. Petitioner further told his brother at that time that Mr. Tennant said that the presence of an attorney at the parole revocation hearing would only result in his receiving "more time," and if inmate Horner insisted on going forward with an attorney he would receive "a local Mexican attorney."

On 15 July 1985 Attorney Charles Sevilla, partner for petitioner's absent attorney, made a telephone call to this case manager at about 10:00 a.m.. The case manager was advising Horner and coordinating his appearance at the scheduled parole revocation hearing the following day or the day after. Mr. Sevilla advised the case manager that the Horner was under "strict instructions" to waive any

speedy parole revocation hearing so that petitioner's attorney could represent him at such hearing. Mr. Sevilla had called because inmate Horner had attempted to call earlier that morning. Mr. Tennant advised Mr. Sevilla of his efforts to dissuade inmate Horner from a continuance of the hearing and to discourage his use of an attorney. Sevilla declared:

> You indicated to me that Mr. Horner could have his hearing either Tuesday or Wednesday and that in your estimation he would get a 24 to 36 month set-off. You also stated that if he did not go forward with the hearing, he would do approximately two months in Lompoc Prison. You also stated that in your experience attorneys only aggravate the situation for the inmate at such hearings. Thus you suggested to Mr. Horner that he waive counsel and go forward with the hearing immediately so that he could leave Lompoc and go to his secondary designation of Safford, Arizona. I told you I would need to speak with Mr. Horner about this because he was under strict instructions from Mr. Cleary, his attorney, not to go forward with the hearing without him. I indicated that I would be prepared to accept Mr. Horner's call to discuss the situation. (CR 1, Ex.G; ER 37-38).

Attorney Sevilla received no call from inmate

Horner. (CR 1:9-10; ER 9-10). Horner was never given the opportunity to speak with either attorney, Sevilla or his brother.[5] (CR 3:5; ER 63).

On the following day, 16 July 1985, the day of the parole hearing, the case manager before the hearing showed Horner his attorney's letter (advising that Horner should not go before the Parole Commission without counsel). Petitioner discounted his attorney's written advice to delay the hearing because of his reliance on the case manager:

> It clearly sounded as if I should not go to the Parole Commission, but after Mr. Tennant's [case manager's] call with attorney Sevilla, to me the situation had changed and it was permissible to go to the parole hearing. Since I had already made a commitment to Mr. Tennant, I did not wish to make waves by changing my mind again. (CR 3:6; ER 64).[6]

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[5] Attorney Horner's secretary left messages for the case manager but the calls were never returned.

[6] Horner in his affidavit also stated: "When I appeared before the parole hearing examiners, they read Mr. Cleary's letter to AUSA Kramer to me, and because of information provided me by

Petitioner had previously discussed the parole guidelines with his attorney, and the case manager's calculation of 24-36 months was consistent with three ounces of cocaine, the basis for the parole revocation. (CR 3:4-5; ER 62-63).

Before the hearing the case manager told Horner not to limit his remarks before the Parole Commission:

> Mr. Tennant appeared to try to help me with the Parole Commission, and he told me to be completely open, candid, and completely truthful with them because my honesty could only help me. (CR 3:6; ER 64).

Mr. Tenant and my commitment to him I indicated that I waived the attorney. I had also signed a form indicating I was waiving an attorney, but these actions were taken based upon the representations made to me by Mr. Tennant." (CR 3:6; ER 64).

REASONS FOR ALLOWANCE OF THE WRIT

A. THE COERCED AND FRAUDULENTLY PROCURED WAIVER OF COUNSEL BY THE CASE MANAGER THE DAY BEFORE AND THE DAY OF THE PAROLE HEARING FROM THE CONFINED AND INCOMMUNICADO PAROLEE WAS NOT DISSIPATED BY THE PAROLEE'S RESTATEMENT OF THE WAIVER BEFORE THE PAROLE COMMISSION.

The right to counsel of a prisoner, under the Sixth Amendment and federal statutes, is enforceable within the walls of a federal prison. The court below recognized the deceit and misconduct of the case manager's interference which caused the "waiver" of counsel in a parole hearing. The case manager acted as the agent of the Parole Commission in arranging the hearing.

Like the district court[7], the Court of Appeal accepted the affidavit of petitioner as true, because his petition was denied without a hearing[8]. Horner in his affidavit stated:

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[7] "Horner's version of the case manager's statements was accepted as true by the district court." (App. A, 2819).

[8] In **Blackledge v. Allison**, 431 U.S. 63 (1977), this Court held that the critical question which must be answered in the affirmative in advance of summary dismissal is whether the

> When I appeared before the parole hearing examiners, they read Mr. Cleary's letter to AUSA Kramer to me, and because of information provided me by Mr. Tennant [case manager] and my commitment to him I indicated that I waived the attorney. CR 3:6, ER 64)(emphasis added).

Accepting the truth of his allegations, the court below rejected petitioner's and his counsels' unrefuted statement that the waiver before the Parole Commission was a product of the misrepresentations and influence of the case manager.

Before this court is conceded wrongful interference with the right to counsel; yet, without an evidentiary hearing as to its extent and impact, the court below foreclosed

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allegations, "when viewed against the record [considered by the court are] so 'palpably incredible,' [Machibroda v. United States, 368 U.S. 487, 495 (1962)], so 'patently frivolous or false,' [Pennsylvania ex rel.] Herman v. Claudy, 350 U.S. 116, 119], as to warrant summary dismissal." 431 U.S. 63, 75-76. See also established Ninth Circuit practice to remand for an evidentiary hearing post-conviction challenges to Rule 11 waivers. United States v. Espinoza, 866 F.2d 1067, 1069-1070 (9th Cir. 1988); Marrow v. United States, 772 F.2d 525, 527; Mayes v. Pickett, 537 F.2d 1080, 1083 (9th Cir. 1976).

review based upon a wholly speculative assumption of facts never determined in a court proceeding. Denial of right to counsel was aggravated by the denial of an evidentiary hearing on the petition for habeas corpus.

The Court of Appeals, with a record devoid of an evidentiary hearing, had no basis to make the factual finding of dissipated taint and an effective waiver of counsel. (App. A, 2820). There was never a hearing to determine the sequence of events, or the interim, if any, between the case manager's conduct and the parole hearing[9], or a factual finding of the pressures on the incommunicado inmate in "lock-down," or the effect of the extensive misrepresentations and coercion of the case manager, or the nature of petitioner's "insistence" to proceed without

[9] Since the case manager was coordinating Horner's appearance before the Parole Commission, he may have been present at the hearing. It is present counsel's experience that case managers are present at the hearing.

an attorney other than to repeat what he had just told the case manager.

The appellate court's acknowledgement of the serious case manager misconduct with respect to the fundamental right to counsel necessitated an evidentiary hearing, and the denial of such a hearing is an extraordinary and exceptional deviance from the precedents of this court (see fn. 8, **supra**).

The opinion below did not assess the pervasive and continuous pressure on petitioner, both the day before and the day of the parole hearing to waive counsel. Just before the parole hearing, petitioner Horner, when shown by his case manager the letter of his attorney requesting the delay, disregarded it and continued his reliance on the case manager. Petitioner's waiver shortly thereafter before the Parole Commission was not free of the case manager's deceitful influence.

In **Machibroda v. United States**, 368 U.S. 487 (1962), the petitioner alleged that the prosecutor induced him to plead guilty for an expected lesser sentence and told him not to tell his lawyer. The conversation with the prosecutor was <u>three days before</u> he plead guilty in court (368 U.S. 487, 490 n.1). The prisoner there was deemed entitled to an evidentiary hearing on his habeas corpus petition, because if the allegations were true the plea of guilty would have to be set aside.

In **Brewer v. Williams**, 430 U.S. 387 (1977), statements made in violation of the defendant's Sixth Amendment right to counsel were held inadmissible. Here, the case manager usurped both the constitutional as well as statutory right to counsel in a federal parole proceeding (18 U.S.C.

4214(a)(2)(B)[10]). The case manager had represented that the partner of petitioner's attorney had approved his waiving counsel at the hearing. Horner never again talked to an attorney, and this conceded misrepresentation was never cured. Before the parole hearing the case manager showed the letter to Horner who still went forward because he had no contact with the outside world. The repetition of the waiver he made to the case manager, possibly a few minutes before,[11] was an automatic and agreed-upon gesture that did not dissipate the egregious conduct of the case manager, who, in fact, substituted himself for counsel after derogating the role

[10] The parolee "shall" be entitled to be represented at the revocation hearing by appointed or retained counsel "unless the parolee knowingly and intelligently waives such representation."

[11] Horner stated he met with the case manager on the day of the parole hearing, but since there was no evidentiary hearing neither the time of this meeting with the case manager nor the time of the parole hearing is reflected in the record.

counsel played in such hearings.[12]

The case manager evaluated petitioner's case and gave his experienced opinion on how three ounces of cocaine would translate into a term of confinement (24-36 months). He told petitioner Horner to "tell all," which included waiving his privilege against self incrimination instead of putting the Parole Commission to its proof.

Petitioner, if represented by an attorney, would have had advice telling him not to make needless incriminatory statements. Had an attorney given the open-ended advice of the case manager without the slightest inquiry into the underlying facts, he would have been incompetent.

The case manager's estimate of 24-36

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[12] Brendan Sullivan, counsel for Oliver North, protested before Congress that counsel should be more than "a potted palm." The case manager wholeheartedly endorsed the floral concept of counsel at federal parole hearings, and the summary approval of the waiver of counsel by the court below endorsed the notion.

months confinement was pivotal to petitioner's waiver of counsel, and this gross misconduct of the case manager should not be excused because petitioner Horner did not apprise him of alleged other narcotic activities. The case manager never inquired.

The court below failed to mention, because it could not, just what passage of time dissipated this taint, because without an evidentiary hearing this would be impossible to determine. The record shows the continuous interference (15-16 July 1985) of the case manager up to and on the very day of the parole hearing. Horner was in "lock-down" isolated from his attorneys and the outside world. The case manager actively lied to him in order to convince him to go through the hearing; he derogated the value of attorneys (it would mean more time in custody), threatened him with two more months of lock-down ("the stick"), promised 24-36 months as

the parole release date ("the carrot"), and counseled him to waive his privilege against self-incrimination. To allow the petitioner's statement before the parole examiners at the prison (i.e., petitioner's following the case manager's misadvice) to cure this grossly unconstitutional infection is truly shocking and renders empty the promise of the guiding hand of counsel guaranteed inmates facing the loss of liberty at parole hearings.

This is not **Wong Sun v. United States**, 371 U.S. 471, 491 (1963), and the court below's reliance on it was improper (App. A, 2820). This Court has best summarized and distinguished **Wong Sun** in a later case:

> Wong Sun's confession, which the Court held admissible, came <u>several days</u> after the illegality, and was preceded by a lawful arraignment and a release from custody on his own recognizance. **Brown v. Illinois**, 422 U.S. 590, 604 n. 11 (emphasis added).

To paraphrase the issue in the language of **Taylor v. Alabama**, 457 U.S. 687, 690 (1982),

the waiver of counsel at parole hearing after the illegal obstruction and misrepresentation by the case manager is not valid "unless intervening events break the causal connection between the illegal [activity of the case manager] and the [waiver] so that the [waiver] is sufficiently an act of free will to purge the primary taint.[13]" The rereading of the attorney's letter by the Parole Commission was no "intervening event." It was the expected happening, the event petitioner was prepared for by the case manager; it was the direct consequence of the days of misadvice given petitioner, an inmate cut off from the advice of counsel, by the case manager.

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[13] This Court based its formulation on **Brown v. Illinois, supra; Wong Sun v. United States, supra;** and **Dunaway v. New York**, 442 U.S. 200 (1979). Citing **Brown v. Illinois, Taylor** identified the factors that should be considered: "the temporal proximity of the [illegal conduct] and the [waiver], the presence of intervening circumstances, ... and particularly, the purpose and flagrancy of the official misconduct." 457 U.S. 687, 690 (1982). The **Brown-Dunaway-Taylor** trilogy was affirmed in **Lanier v. South Carolina**, 106 S.Ct. 297 (1985).

B. PETITIONER, A PAROLEE, WAS DENIED REASONABLE ACCESS TO ADVERSE INFORMATION BEFORE PAROLE HEARING IN VIOLATION OF 18 U.S.C. 4208(b) AND U.S. DEPARTMENT OF JUSTICE V. JULIAN, 108 S.CT. 1606 (1988).[14]

The statute, 18 U.S.C. 4208(b), mandates:

> At least thirty days prior to any parole determination proceeding, the prisoner shall be provided with ... (2) reasonable access to a report or other document to be used by the Commission in making its determination.[15]

This court clarified the plain language of section 4208(c) in **U.S. Dept. of Justice v. Julian**, 108 S.Ct. 1606, 1612 (1988), where it held:

> "Similarly, the provision of the Parole Act dealing with presentence reports is also designed to ensure that much of the information on which a parole decision is to be based, including the presentence report, be disclosed to the potential parolee. In line with this intent, Congress expressly required that

[14] As noted at the outset, the opinion refers neither to the statute nor to **Julian**.

[15] In interpreting this statute, another panel of the Court of Appeal found it unambiguous and controlling: "[T]he Parole Commission did violate [the federal parolee's] statutory hearing rights when it based its parole determination on a report that was not made reasonably accessible to Anderson in advance of the hearing." **Anderson v. U.S. Parole Com'n.**, 793 F.2d 1136, 1137 (9th Cir. 1986).

> all prisoners be furnished with 'reasonable access' to the pertinent documents at least 30 days before a parole hearing. § 4208(b)."

Inconsistent with the rule of **Julian**, the petitioner here was denied reasonable access to adverse documents secretly used by the examiner's against him. The Court of Appeal improperly construed the regulation to create an impossible "demand" requirement which effectively overruled **Julian** and the statutes.[16]

We start with the obvious. Requiring a "formal" request for adverse information by an unrepresented, isolated inmate being fed mendacious advice by a prison case manager just preceding an unanticipated parole revocation hearing not only contradicts the

[16] The Western Regional Parole Commission has a new policy of obtaining written waivers of right to access signed by the parolee who has not been given thirty days advance access to adverse information. If not signed, the hearing is automatically continued. This administrative practice which comports with the statute and **Julian** may be jeopardized if federal agencies rely on the opinion in this case.

letter and spirit of the relevant statute and **Julian**, it is absurd. And as Voltaire once said, when we commence believing in absurdities, atrocities soon follow.

If the Parole Commission deemed the withheld information here might fall within a statutorily recognized exception to exposure (e.g., revelation of information when there is a promise of confidentiality or harm resulting from disclosure (18 U.S.C. 4208(c)(2) and (3))), the statute still requires a disclosure of a summary of the information withheld:

> If any document is deemed by either the Commission, the Bureau of Prisons, or any other agency to fall within the exclusionary provisions of subparagraphs (1), (2), or (3) of this subsection, then it shall become the duty of the Commission, the Bureau, or such other agency, as the case may be, to summarize the basic contents of the material withheld, bearing in mind the need for confidentiality or the impact on the inmate, or both, and furnish such summary to the inmate. 18 U.S.C. 4208(c) (emphasis added).

Neither the adverse information nor a

summary was furnished petitioner Horner prior to or at the parole revocation hearing. The report of the Parole Commission considered and referred to the other undisclosed drug activity to triple his release date from 24-36 months to 62-90 months.

Regulations do not override the statute that is designed to give early access (30 days) to the parolee. Compliance here would have been difficult because the parole authorities insisted on yanking petitioner from San Diego and putting him in front of a revocation panel four days later. While the record contains no information as to whether petitioner Horner made an oral request for information prior to the parole hearing. The case manager must have had access to petitioner's file to make his estimate of 24-36 months. Again, an evidentiary hearing could resolve this issue, and the court below overreached when it strained to make a factual

finding of a failure to make a request for the information.

Moreover, the need for such a formal request in the circumstances of this case is preposterous. The court below totally failed to consider petitioner's surprise at being at the parole hearing. Horner had discussed the relationship of the parole revocation hearing to his criminal case with his counsel and expected the hearing would occur after his sentencing. One attempt to transfer him to another correctional institution for the hearing had been stopped, and he did not anticipate his being whisked away to Lompoc from the San Diego MCC, and to be facing a parole revocation within four days of his movement (CR 3:2; ER 60; CR 1 Ex F, ER 35).

At the hearing, lied to by his keepers, kept from contact with his counsel and his counsel's partner as well as his own brother (also a lawyer), petitioner followed the

insistent advice of the case manager. What followed was a scene straight out of Kafka:

> [The authorities] wanted to eliminate defending counsel as much as possible; the whole onus of th Defense must be laid on the accused himself. A reasonable enough point of view, yet nothing could be more erroneous than to deduce from this that accused persons had no need of defending counsel when appearing before this Court. On the contrary, in no other Court was legal assistance so necessary. For the proceedings were not only kept secret from the general public, but from the accused as well. . . .[E]ven the accused had no access to the Court records, and to guess from the course of an interrogation what documents the Court had up its sleeve was very difficult . . . . . F. Kafka, The Trial 145-46 (Emphasis added). (Modern Library ed. 1937).

C. THE SPECIAL TERM REMOVAL UNDER **BIFULCO** WAS NOT A "CASE SPECIFIC FACTOR" THAT EXCUSED REQUIRED EARLY TERMINATION OF PAROLE.

In 1981 Horner' probation (parole) officer expressly stated that the reason for not recommending early termination of parole was because the fine had to be paid in full before supervision was terminated. (CR 12 Ex E; ER 94). The probation officer noted also

the special parole term of four years had been deleted from petitioner's sentence. (CR 12, Ex E; ER 95). The Parole Commission concurred and adopted the Probation Officer's recommendation of an extension of supervision, commented on the inappropriateness of extending parole for non-payment of the fine, but made no comment about the **Bifulco** adjustment. (CR 12, Ex E; ER 94).

Although the Parole Commission said nothing about **Bifulco**, the court below found it to be a "case specific factor" that under the Parole regulations excused early termination. These regulations define "case-specific factors":

> (2) Decisions to continue the parolee under supervision past the period indicated above may be made where case-specific factors justify a conclusion that continued supervision is needed to protect public welfare. Such case-specific factors may relate to the current behavior of the parolee (for example, a parolee whose behavior begins to deteriorate as the normally expected time for termination approaches) or the parolee's background (for example, a

> parolee with a history of repetitive assaultive conduct or substantial involvement in large scale or organized criminal activity). In such cases, an additional period of supervision prior to termination of jurisdiction may be warranted. 28 C.F.R. 2.43(e)(2).

The case-specific factors needed to protect public welfare relate either to (1) "current behavior" or (2) "the parolee's background." "Absent case-specific factors to the contrary, termination of supervision shall be considered indicated. . . ." 28 C.F.R. 2.43(e)(1).

Hindsight reconstruction is not a substitute for the Parole Commission's duty to find and rely on a case-specific factor. **Bifulco** eliminated petitioner's four-year special parole term, which was only one year more than the minimum required by law for substantive offenses. 21 U.S.C. 841(b)(1)(A) in effect in 1976. The district court never sought a re-sentencing because of a misunderstanding as to an essential element of the sentence, nor did the prosecutor. The

district court could have given a life special parole, but it gave little more than the minimum.

The Parole Commission did not consider the elimination of the special parole term. It was completely improper for the court of appeals below to use that factor as the Parole Commission's "finding" of a case-specific factor to justify the revocation hearing.

CONCLUSION

This court has granted great administrative discretion to prison authorities. There are limits however. No prison officer should be allowed to interdict and destroy the attorney-client relationship. This court should review this case to insure that the right to counsel, protected by the Sixth Amendment and federal statute, does not ring hollow behind prison walls. The egregious conduct recognized by the Court of Appeals was not attenuated by the petitioner's ritualistic repetition of a "waiver" drilled into him by a mendacious representative of the government, and such attenuation was not that of **Wong Sun**, nor consistent with subsequent precedent of this court requiring an intervening event.

The inmate's access to information prior to a revocation hearing, especially critical adverse information, is required by statute as

was recognized recently by this Court. The deprivation of access here merits review.

To allow these serious and thoroughly corroborated allegations of government misconduct to be dismissed without an evidentiary hearing is an example of too much efficiency and too little justice.

This court should grant a writ of certiorari to review the judgment of the court of appeals denying the evidentiary hearing and the writ of habeas corpus in this case. petitioner's conviction.

Respectfully submitted,

July 23, 1989

John J. Cleary
Attorney for Petitioner,
MONTANA HORNER

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MONTANA HORNER, *Petitioner-Appellant,* v. UNITED STATES PAROLE COMMISSION, *Respondent-Appellee.*	No. 87-2989 D.C. No. CV-87-0204-WDB ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
William D. Browning, District Judge, Presiding

Argued and Submitted
February 8, 1989—Phoenix, Arizona

Filed March 24, 1989
Amended June 20, 1989

Before: Alfred T. Goodwin, Arthur L. Alarcon and
Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Criminal Law

The court affirmed the denial of a writ of habeas corpus, holding that the Parole Commission's decision to continue a parole did not violate its own regulations and that the parolee validly waived his right to counsel at a revocation hearing.

Appellee United States Parole Commission revoked appellant Montana Horner's parole based on his conviction on drug charges. He had been placed on parole after serving part of a sentence on other drug charges. The district judge imposed a special parole term of four years to run consecutive to any period of supervision ordered by the Commission. The special parole term was later stricken pursuant to a Supreme Court decision. Horner's probation officer recommended against early termination, and the Commission followed the recommendation, stating no reason for its decision. Horner broke parole and was indicted on the drug charges. His attorney requested that the parole revocation hearing be continued until he could be present. A case manager urged Horner to waive his right to counsel at the hearing. Horner signed a written waiver. His attorney's letter was read to him at the hearing, but Horner insisted on proceeding. He claimed that his waiver was invalid, and that the Commission improperly denied him parole in violation of its own regulation.

[1] The Parole Commission is required to follow its own regulations, but is not required to consider early termination if there are case specific factors that caution against it. [2] The Commission was free to continue the parole in light of the trial judge's determination that a long period of parole supervision was required. [3] Removal of the special parole requirement from Horner's sentence was an appropriate case specific reason to continue the parole. The Commission's decision was proper. [4] It was totally inappropriate for a case manager to advise a prisoner that he should waive counsel. [5] Horner's insistence on proceeding without counsel was a free, knowing and intelligent waiver. The case manager's erroneous advice was attenuated by the lapse of time, the special caution exhibited by the hearing examiners to determine if Horner's waiver should be accepted, and his insistence on proceeding despite his attorney's request for a continuance.

COUNSEL

John J. Cleary, San Diego, California, for the petitioner-appellant.

Eugene R. Bracamonte, Assistant United States Attorney, Tucson, Arizona, for the respondent-appellee.

ORDER

The opinion filed March 24, 1989 is amended by adding the following at the end of the first full paragraph on page 2820 of the slip opinion:

> The hearing examiners could not have been expected to have known of the case manager's misbehavior. Their questioning was aimed at allowing Horner to express any reservations he had about waiving counsel. The examiner's caution was both appropriate and sufficient, given that Horner apparently was not willing to disclose the case manager's advice.

Subject to this amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no active judge of the court has requested a vote thereon. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

OPINION

ALARCON, Circuit Judge:

Montana Horner appeals from the district court's denial of his petition for a writ of habeas corpus. Horner seeks reversal on the following grounds:

One. The Parole Commission improperly denied him early termination of his parole in violation of 28 C.F.R § 2.43(e), after he had completed three years without any adverse report concerning his behavior.

Two. His waiver of his right to counsel at the parole revocation hearing was invalid because it was the product of coercion and misrepresentation.

Three. He was denied access to adverse information in violation of 18 U.S.C. § 4208(c).

We disagree and affirm. We address each of Horner's contentions and the facts pertinent thereto under separate headings.

I

STANDARD OF REVIEW

We review the denial of a petition for habeas corpus independently, without deference to the district court's determination. *Roth v. United States Parole Commission,* 724 F.2d 836, 839 (9th Cir. 1984). Our review of a Parole Commission's decision is very narrow. We may review "whether the Commission acted outside its statutory authority or has violated the Constitution." *Coleman v. Perrill,* 845 F.2d 876, 878 (9th Cir. 1988). We are precluded from reviewing "whether the Commission's decision involves the exercise of judgment among a range of possible choices or options," but we may

determine whether a decision involves "a plain violation of a matter which does not admit of discretion and choice." *Wallace v. Christiansen*, 802 F.2d 1539, 1552 (9th Cir. 1986) (en banc). If there is a violation of a non-discretionary matter, the Commission must show "good cause" for that action. *Id.*

II

The Parole Commission revoked Horner's parole based on his conviction for conspiracy to possess with intent to distribute cocaine on or about April 16, 1982 and other evidence including Horner's admissions that he had engaged in narcotics trafficking over a two-year period. Horner argues that the Parole Commission order revoking his parole is invalid because he was entitled to be terminated from parole supervision in 1981 based upon the probation officer's June 1, 1981 report that "Mr. Horner has been making what appears to be a satisfactory adjustment under supervision." Horner also contends that the Parole Commission improperly denied early termination of his parole in 1981 in violation of its own regulation, 28 C.F.R. § 2.43(e)(1)(ii).

Horner summarizes this argument on pages 34 and 35 of his opening brief in the following words:

> Because the Parole Commission improperly failed to comply with its own regulation and terminate petitioner's parole, the Pennsylvania federal parole term should be terminated effective May 1981 and the petitioner be given credit for time served in federal custody after that date on his San Diego federal sentence.

On June 2, 1976, Horner pled guilty in the United States District Court for the Western District of Pennsylvania to two counts in separate indictments of wilfully and knowingly conspiring to distribute and possess narcotics with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Horner was sentenced on these charges on June 2, 1976. In addition to ordering five-year sentences to be served consecutively, the district court imposed a special parole term under 21 U.S.C. § 841 (b)(1)(B) of two years for each offense. A special parole term is a period of supervision "in addition to and not in lieu of any other parole provided by law." 21 U.S.C. § 841(c). In making its sentencing decision, the district court also ordered the special parole terms to run consecutively. Thus, the district court clearly intended that Horner be supervised on parole for four years in addition to any period of supervision ordered by the Parole Commission.

On April 16, 1978, the Parole Commission ordered Horner released on parole after he served 26 months of his ten-year consecutive sentence. His parole term was ordered to expire on February 28, 1986. In 1979, his parole supervision was transferred to Ventura, California.

One year later, on June 16, 1980, the Supreme Court held in *Bifulco v. United States*, 447 U.S. 381 (1980), that a special parole term does not apply to conspiracy convictions under the Comprehensive Drug Abuse Prevention and Control Act. *Id.* at 400-01. Thereafter, on November 6, 1980, Horner's probation officer, Stanley R. Monaghan, wrote a letter to the Chief United States Probation Officer in Pennsylvania expressing his concern about the impact of the *Bifulco* decision on Horner's four-year special parole term which was due to commence on February 28, 1986. On November 19, 1980, the district court, acting *sua sponte*, issued an order eliminating Horner's special parole term. On May 5, 1980, the supervising probation officer recommended against early termination of parole. The Parole Commission's case analyst commented as follows:

> Satisfactory adjustment. Because of SPT [special parole term] subject could be considered for early term of *regular* parole. However, in view of the fact that he was serving 2 consec. 5 yr. sentences & we do

> not have much info on offense, recommend continuance another year. *Next year may term[inate] early to SPT.*
>
> (emphasis added).

The Parole Commission agreed with the case analyst's recommendation. Horner was continued on parole.

On June 1, 1981, Monaghan reviewed Horner's progress and stated:

> Mr. Horner has been making what appears to be a satisfactory adjustment under supervision. He still has a committed fine with a balance of $3,575.20. He has been making fairly regular payments on this fine. Mr. Horner is working steadily and reporting promptly and his attitude appears to be very good. We are not recommending early termination because of the fact that he does have a committed fine and it should be paid in full before supervision is terminated. . . . Mr. Horner's overall response to supervision has been very satisfactory because of his steady employment and regular payments on his committed fine and regular office visits. His attitude is very good.
>
> It is to be noted that his Special Parole Term which was part of his original sentence has now been deleted because of the Bifulco decision and we are sending you a copy attached to this form verifying this decision.

Thus, the probation officer recommended against early termination of the parole term set by the Parole Commission and alerted that body that the four-year special parole term had been deleted because of the Supreme Court's opinion in *Bifulco*.

The case analyst reviewed the probation officer's evaluation and made the following notation:

> G/L [guidelines] 3 yrs. w/in G/L. P.O. [probation officer] is recommending continued supervision due to committed fine. Everything else looks positive. One prior conviction. *Should respond to P.O. advising fine no reason to continue & will consider* early term[ination] next year since w/in g/l. Continue. 6/9/81

(emphasis in original).

The Parole Commission agreed with the recommendation of the case analyst and the probation officer without comment.

Horner contends that the Parole Commission did not follow its own guidelines in declining to order early termination of his parole after receiving the probation officer's June 1, 1981 report. Horner relies on the following language from 28 C.F.R. § 2.43(e)(1)(ii):

> (e) *Early termination guidelines*: In determining whether to grant early termination from supervision, the Commission shall apply the following guidelines:
>
> (1) Absent case-specific factors to the contrary, termination of supervision shall be considered indicated when: . . .
>
> (ii) A parolee originally classified in other than the very good risk category (pursuant to § 2.20) has completed three continuous years of supervision free from any indication of new criminal behavior or serious parole violation.

Horner asserts that the Parole Commission continued petitioner's parole "because of the unpaid fine." Appellant's Opening Brief, page 22. In his Reply Brief at page 2, Horner states: "The *only* reason given, the fine, was admittedly in error, nevertheless, the Parole Commission gave no other reason." The record does not support Horner's contention that the Parole Commission rejected early termination because the fine was unpaid. In fact, as set forth above, the case analyst advised the Parole Commission that the fact that the fine had not been paid was *not* a valid reason to continue someone on parole. There is nothing in the record that would support an inference that the Parole Commission rejected the case analyst's conclusion that the failure to pay off the fine was not a valid reason to deny early termination.

The Parole Commission gave no reason for its decision to continue Horner on parole. The statute authorizing early termination of parole, 18 U.S.C. § 4211(b), does not require that the Parole Commission issue a statement of its reasons for an adverse determination.

[1] We agree with Horner that the Commission is required to follow its own regulations. *Wallace*, 802 F.2d at 1552 n.8. Horner has failed to demonstrate that the Parole Commission did not follow its early termination guidelines. The Parole Commission is not required to consider early termination of parole if there are case specific factors that caution against cessation of supervision.

The record shows that the trial judge intended that supervision of Horner continue for four years *after* the Parole Commission terminated his regular parole. After the district court imposed a consecutive sentence totalling ten years, to be followed by four years of parole supervision *in addition to* that imposed by the Parole Commission, the Supreme Court ruled that special terms of parole could not be considered for a conspiracy offense. Accordingly, the district court was compelled to strike the special parole term provisions from the sentence.

[2] The Parole Commission was advised of the district court's concern that Horner serve an extended period of time on parole on June 1, 1980 and June 1, 1981. The Parole Commission was free in the exercise of its discretion to continue Horner on parole, notwithstanding his apparent "satisfactory adjustment under parole supervision," in light of the trial judge's determination that a long period of parole supervision was required because of the serious nature of the charged crimes.

[3] Consideration of the effect of the removal of the special parole requirement from Horner's sentence on his complete rehabilitation was an appropriate case specific reason to continue Horner on parole although he appeared to be making a satisfactory adjustment under parole supervision. The Parole Commission's decision was not "arbitrary, irrational, unreasonable, or capricious." *Wallace*, 802 F.2d at 1551.

III

Horner contends that he was denied the right to be represented by counsel at his parole revocation hearing as the result of coercion and misrepresentation by a senior case manager, at the United States Penitentiary at Lompoc, California.

On April 21, 1982, the probation officer assigned to supervise Horner recommended that he be continued on parole. The Parole Commission was advised that Horner was a prime suspect in the transportation of narcotics between Southern California and Pennsylvania. Sometime in the first half of 1982, Horner absconded from parole supervision. On July 23, 1983, a parole violation report was submitted to the Parole Commission. Horner had failed to file a monthly report with his probation officer in May and June of 1982. He also failed to file a notice of change of address. In 1982, Horner was indicted in the Eastern District of Missouri for conspiracy to possess cocaine with the intent to distribute and

using a telephone to arrange a controlled substance transaction.

On September 1, 1982, a parole violation warrant was issued for Horner's arrest. He was arrested in San Diego on April 3, 1985. On May 23, 1985, Horner filed a consent to transfer the Missouri indictment to the Southern District of California. On June 14, 1985, Horner entered a plea of guilty to a charge of conspiracy to possess with intent to distribute approximately three ounces of cocaine in violation of 21 U.S.C. § 846.

The Parole Commission scheduled a parole revocation hearing prior to the date of sentencing in the district court. On July 12, 1985, Horner's attorney, John J. Cleary, sent a letter to an assistant United States Attorney advising him that defense counsel would be out of the country on the date set for the parole revocation hearing. Mr. Cleary's letter contained the following language:

> Because I am familiar with the case and the basis for the parole revocation my client Montana Horner and I feel it is imperative that I be present at any parole revocation hearing. It is mandatory under 18 U.S.C. 4214(c) that this hearing be conducted within 90 days, but I have spoke [sic] with representatives of the Regional Office and indicated to them that my client would wish this hearing continued in order that I could be present. The hearing will be held and my client will have to request a continuance by himself, for I will be out of the country after today.

On July 15, 1985, a case manager at the United States Penitentiary at Lompoc, California, had a conversation with Horner. Horner's version of the case manager's statements was accepted as true by the district court. Horner informed the case manager that his attorney was out of the country. The case manager urged him to proceed with the parole revoca-

tion hearing in the absence of his attorney or he would "stay here in lockdown for two months until the parole hearing officers come back in September."

The case manager advised Horner that "a guy often gets more time when he brings his attorney." The case manager also informed Horner that if he insisted on being represented by counsel, he would receive "a local Mexican attorney." The case manager told Horner that he would be released on parole after serving an additional 24 - 36 months in confinement. After speaking to Mr. Cleary's law partner, Charles Sevilla, the case manager advised Horner that Mr. Sevilla had agreed that Horner should proceed without counsel. Mr. Sevilla did not tell the case manager that Horner should proceed.

[4] Horner signed a waiver of counsel in the case manager's presence on July 5, 1985. If this were the only waiver of counsel executed prior to the revocation hearing by Horner, we would be hard pressed to conclude that it was made freely and voluntarily. It is totally inappropriate for a case manager, who is aware that the attorney for a parole violator wants to be present at a revocation proceeding, to advise the prisoner that he should waive counsel. We also deplore the case manager's gratuitous and racist comments concerning the type of attorneys purportedly appointed to represent parolees at revocation hearings.

In stark contrast to the case manager's unacceptable behavior, the hearing examiners fully respected Horner's right to be represented by counsel. Prior to commencing the revocation proceedings, Mr. Cleary's July 12, 1985 letter, in which he stated that it was imperative that he be at the revocation hearing, was read to Horner. Nevertheless, Horner insisted on proceeding without counsel.

[5] We are persuaded from the record that Horner's insistence on proceeding without counsel constituted a free, knowing and intelligent waiver. The case manager's inappropriate

and erroneous advice was sufficiently attenuated by the lapse of time, the special caution exhibited by the hearing examiners to determine whether Horner's written waivers of counsel should be accepted, and Horner's decision to proceed without his counsel notwithstanding his attorney's recommendation that he seek a continuance. *Cf. Wong Sun v. United States*, 371 U.S. 471, 491 (1963)(the taint of prior illegal conduct may be dissipated by the passage of time). The hearing examiners could not have been expected to have known of the case manager's misbehavior. Their questioning was aimed at allowing Horner to express any reservations he had about waiving counsel. The examiner's caution was both appropriate and sufficient, given that Horner apparently was not willing to disclose the case manager's advice.

Horner also contends that the case manager misrepresented the amount of time he would be required to serve if his parole was revoked. The case manager estimated that Horner would serve an additional 24 - 36 months. No misrepresentation occurred. The case manager was not told by Horner that he was involved in distributing about twelve ounces of cocaine per month for a two-year period.

IV

Horner alleges that the Parole Commission violated his statutory rights when it based its determination not to terminate his parole in 1982 on information which was not accessible to him. He also claims that the Parole Commission's failure to give him advance notice of such information prior to his parole revocation hearing in 1985 mandates a new hearing with the proper procedural safeguards.

Horner did not request these documents until April 11, 1985, four years after the Commission made its decision. The regulation 28 C.F.R. § 2.34 which permits access to adverse information proceeds as follows:

> (b) Upon the ordering of a rescission hearing under this section, the prisoner shall be afforded written notice specifying the information to be considered at the hearing. The notice shall further state that the purpose of the hearing will be to decide whether rescission of the parole date is warranted based on the charges listed on the notice, and shall advise the prisoner of the procedural rights described below
> . . . .
>
> (f) The evidence upon which the rescission hearing is to be conducted shall be disclosed to the prisoner *upon request,* subject to the exemptions set forth at § 2.55.

Id. (emphasis added). Information is exempted from disclosure if it contains "[m]aterial which would reveal a source of information obtained upon a promise of confidentiality" or if harm might result if the information is disclosed. 28 C.F.R. § 2.55(c)(2). The record shows that certain information was deleted from the probation officer's reports because it contained the identity of a confidential informant. Disclosure might have resulted in harm to the informant. This material was properly deleted under 28 C.F.R. § 2.55(c). AFFIRMED.

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IN THE UNITED STATES SUPREME COURT

89-

MONTANA HORNER,

Petitioner.

v.

UNITED STATES PAROLE COMMISSION,

Respondent,

PROOF OF SERVICE

I, the undersigned, say that I am over 18 years of age, a resident of the State of California and not a party to the within action;

That my business address is 1010 Second Ave., Suite 1601, San Diego, California 92101;

That I served the within Petition for a Writ of Certiorari by mailing it in first class mail to:

Eugene R. Bracamonte
Office of the United States Attorney
110 South Church Street, Ste. 310 (Acapulco Bldg)
Tuscon, Arizona 85701

AND

Charles Fried
Solicitor General
Dept. of Justice
Washington, D.C. 80530

I certify under penalty of perjury that the foregoing is true and correct. Executed on this th day of July 1989 at San Diego, CA.

_____

Supreme Court, U.S.
FILED
OCT 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-155

In the Supreme Court of the United States

OCTOBER TERM, 1989

MONTANA HORNER, PETITIONER

v.

UNITED STATES PAROLE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the United States Parole Commission correctly decided to continue petitioner on parole in 1981.

2. Whether petitioner validly waived his right to counsel at his parole revocation hearing in July 1985.

3. Whether the Parole Commission improperly relied on information that was allegedly withheld from petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	14
Bifulco v. *United States*, 447 U.S. 381 (1980)	3
United States v. *Lovasco*, 431 U.S. 783 (1977)	14
Widgery v. *United States*, 796 F.2d 223 (8th Cir. 1986)	14

Statutes and regulations:

Parole Commission and Reorganization Act of 1976, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. 4201 *et seq.*:	
18 U.S.C. 4203(a)(1)	16
18 U.S.C. 4208	16
18 U.S.C. 4297(b)	15, 16
18 U.S.C. 4208(b)(2)	15
18 U.S.C. 4208(c)(2)	15
18 U.S.C. 4208(c)(3)	15
18 U.S.C. 4211 (repealed 1987)	15
Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236:	
21 U.S.C. 841(a)(1)	2
21 U.S.C. 843(b)	5
21 U.S.C. 846 (§ 406)	2, 3, 5

Statutes and regulations—Continued: Page

Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987:
§ 218(a)(5), 98 Stat. 2027 ..... 2, 9
§ 235, 98 Stat. 2031-2033 ..... 2, 9
§ 235(b)(1)(A), 98 Stat. 2032 9
Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 ..... 2, 9
28 C.F.R.:
Section 2.34 6
Section 2.34(f) 9, 16
Section 2.43 7
Section 2.43(e) 6-7, 10
Section 2.43(e)(1) 10
Section 2.43(e)(2) 10
Section 2.55(c)(2) 9
Section 2.55(c)(3) 9

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The amended opinion of the court of appeals (Pet. App. 1-14) is reported at 870 F.2d 1489.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1989. A petition for rehearing was denied on July 11, 1989. Pet. App. 3. The petition for a writ of certiorari was filed on July 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In June 1976 petitioner pleaded guilty to narcotics charges in the United States District Court for the Western District

of Pennsylvania. He was convicted on one count of conspiring to distribute LSD and to possess LSD with the intent to distribute it, in violation of 21 U.S.C. 846, and one count of possessing LSD with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive terms of five years' imprisonment on each count, to be followed by consecutive terms of two years' special parole on each count. On April 2, 1987, petitioner filed a motion for a writ of habeas corpus in the United States District Court for the District of Arizona. The district court denied that motion on November 16, 1987. E.R. 26, 170.[1] The court of appeals affirmed. Pet. App. 1-14.

1. The background of this case is set forth in the opinion of the court of appeals (Pet. App. 5-9) and the government's brief in the court of appeals (Gov't C.A. Br. 3-10). The district court imposed petitioner's original ten-year sentence on June 2, 1976. On April 16, 1978, after petitioner had served 26 months of that sentence, the United States Parole Commission ordered petitioner to be released on parole. The Commission ordered petitioner's parole term to begin immediately and expire on February 28, 1986. Pet. App. 5-6; Gov't C.A. Br. 3.

In May 1980, the Parole Commission reviewed petitioner's case under 18 U.S.C. 4211 (1982).[2] Petitioner's supervising probation officer recommended against early termination of parole, and the Commission's case analyst stated as follows:

> Satisfactory adjustment Because of SPT [special parole term] subject could be considered for early term of

---

[1] "E.R." refers to the Excerpts of Record filed in the court of appeals.

[2] 18 U.S.C. 4211 (*repealed* effective November 1, 1987, *by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031-2033, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728) authorized the Parole Commission to order early termination of parole.

> *regular* parole. However, in view of the fact that he was serving 2 consec. 5 yr. sentences & we do not have much info on offense, recommend continuance another year. *Next year may term[inate] early to SPT.*

Pet. App. 6-7 (brackets in original). The Parole Commission accepted the case analyst's recommendation and continued petitioner under parole supervision. *Ibid.*; Gov't C.A. Br. 3.

In June 1980, this Court decided *Bifulco* v. *United States*, 447 U.S. 381. In *Bifulco*, the Court held that Section 406 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1265, 21 U.S.C. 846, does not authorize a sentencing court to impose a term of special parole upon a defendant who is convicted of conspiracy to manufacture or distribute a controlled substance. 447 U.S. at 387-401. As a result of that decision, the district court in November 1980 issued an order eliminating petitioner's special parole term. Pet. App. 6.

In June 1981, the Parole Commission again reviewed petitioner's case. Petitioner's probation officer, in recommending against early termination of parole, made the following comments:

> [Petitioner] has been making what appears to be a satisfactory adjustment under supervision. He still has a committed fine with a balance of $3,575.20. He has been making fairly regular payments on this fine. [Petitioner] is working steadily and reporting promptly and his attitude appears to be very good. We are not recommending early termination because of the fact that he does have a committed fine and it should be paid in full before supervision is terminated. . . . [Petitioner's] overall response to supervision has been very satisfactory because of his steady employment and regular payments on his committed fine and regular office visits. His attitude is very good.

Pet. App. 7.[3] The Commission's case analyst reviewed the probation officer's evaluation and made the following notation on June 9, 1981:

> [Guidelines] 3 [years within guidelines]. [probation officer] is recommending continued supervision due to committed fine. Everything else looks positive. One prior conviction. *Should respond to [probation officer] advising fine no reason to continue [and] will consider* early [termination] next year since [within guidelines]. Continue.

Id. at 8 (emphasis in original). The Parole Commission, without further comment, agreed with the recommendation of the case analyst and the probation officer, and thus continued petitioner under parole supervision. *Ibid.*

2. The Commission reviewed petitioner's parole status again in April 1982. At that time, petitioner's probation officer recommended that the Commission continue his parole because petitioner was a prime suspect in an ongoing narcotics investigation. The Commission agreed that, in light of that information, petitioner should remain subject to supervision. Pet. App. 10; Gov't C.A. Br. 4. The Commission's decision proved to be well founded.

While on parole, petitioner was managing a cocaine distribution ring that transported cocaine between Southern California and Pennsylvania. In April 1982, federal authorities brought petitioner's operation to an abrupt halt when they arrested his girlfriend in St. Louis as she was trying to close a cocaine sale. Once petitioner learned of his girlfriend's arrest, he stopped reporting to his probation officer and became a fugitive. Petitioner was later indicted

---

[3] The probation officer also noted that, as a result of *Bifulco*, the district court had eliminated petitioner's special parole term. Pet. App. 7.

in the Eastern District of Missouri for conspiracy to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and use of a telephone to facilitate a narcotics transaction, in violation of 21 U.S.C. 843(b). On September 1, 1982, as a result of petitioner's fugitive status and the pending indictment, the Parole Commission issued a parole violation warrant for his arrest. Pet. App. 10-11; Gov't C.A. Br. 4-5.

Several years later, on April 3, 1985, FBI agents arrested petitioner in San Diego. Petitioner agreed to have the outstanding Missouri indictment transferred to the Southern District of California. On June 15, petitioner pleaded guilty to a charge of conspiring to possess three ounces of cocaine with the intent to distribute it, in violation of 21 U.S.C. 846. Pet. App. 11; Gov't C.A. Br. 5.

The Parole Commission held an institutional parole revocation hearing on July 16, 1985, before petitioner's sentencing on the conspiracy charge. At that hearing, petitioner stated that he had distributed about 12 ounces of cocaine per month over a two-year period. Information given to the Drug Enforcement Administration by a confidential informant corroborated petitioner's admission. Based on that admission, the examiner panel determined that petitioner, during his parole term, had distributed approximately 5,634 grams of cocaine. As a result, petitioner's parole violation rated Category Seven under the applicable reparole guidelines. The panel accordingly recommended that the Commission revoke petitioner's parole and not reparole him since his mandatory release date would come before he reached the date on which he would be eligible for parole under the reparole guidelines. Gov't C.A. Br. 6-8.

The Regional Parole Commissioner agreed with the examiner panel's recommendation and ordered petitioner's parole revoked. While petitioner's parole status was on administrative appeal, the district court sentenced petitioner

on his cocaine conspiracy conviction. The Parole Commission ordered petitioner's parole case remanded for a special consideration hearing to take into account his new sentence. Gov't C.A. Br. 9.

At that hearing, petitioner asked the examiner panel to consider the amount of cocaine listed in the presentence report prepared for his recent sentencing, 71.85 grams of cocaine, as opposed to petitioner's earlier admission, which gave rise to the panel's calculation that petitioner had distributed more than 5,634 grams. The panel refused petitioner's request. Instead, it considered his earlier admission at the revocation hearing, together with the corroborating information given to the DEA. The panel therefore recommended that the Commission continue petitioner on parole until its expiration date. Gov't C.A. Br. 9.

The Regional Parole Commissioner agreed with this recommendation, and again ordered that petitioner remain on parole until expiration. The Commission's National Appeals Board affirmed that decision on petitioner's administrative appeal. Gov't C.A. Br. 9-10.

3. On April 2, 1987, petitioner filed a motion for a writ of habeas corpus in the United States District Court for the District of Arizona. Petitioner raised three separate claims: that the Parole Commission improperly denied him early termination of parole in 1981; that he had not validly waived his right to counsel at the parole revocation hearing in July 1985; and that the Parole Commission had improperly relied on information allegedly withheld from him. On November 16, 1987, the district court denied petitioner's motion without holding an evidentiary hearing. Pet. App. 4; E.R. 26, 170, 171.

4. The court of appeals affirmed. Pet. App. 1-14. The court first rejected petitioner's claim that the Parole Commission did not follow its own guidelines, set forth in 28

C.F.R. 2.43(e), in refusing to order early termination of his parole after receiving the probation officer's June 1981 report.[4] The guidelines expressly provide that the Commission "is not required to consider early termination of parole if there are case specific factors that caution against cessation of supervision." Pet. App. 9. Here, the record showed that "the trial judge intended that supervision of [petitioner] continue for four years *after* the Parole Commission terminated his regular parole," *ibid.*, although the intervening *Bifulco* decision required the district court to strike the previously imposed special parole term. Moreover, the Commission "was advised of

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[4] 28 C.F.R. 2.43 provides in pertinent part:

(e) **Early termination guidelines**: In determining whether to grant early termination from supervision, the Commission shall apply the following guidelines:

(1) Absent case-specific factors to the contrary, termination of supervision shall be considered indicated when:

* * * * *

(ii) A parolee originally classified in other than the very good risk category (pursuant to § 2.20) has completed three continuous years of supervision free from any indication of new criminal behavior or serious parole violation.

* * * * *

(2) Decisions to continue the parolee under supervision past the period indicated above may be made where case-specific factors justify a conclusion that continued supervision is needed to protect public welfare. Such case-specific factors may relate to the current behavior of the parolee (for example, a parolee whose behavior begins to deteriorate as the normally expected time for termination approaches) or to the parolee's background (for example, a parolee with a history of repetitive assaultive conduct or substantial involvement in large scale or organized criminal activity). In such cases, an additional period of supervision prior to termination of jurisdiction may be warranted.

the district court's concern that [petitioner] serve an extended period of time on parole on June 1, 1980 and June 1, 1981." *Id.* at 10.

Under these circumstances, the court of appeals determined that the Commission

> was free in the exercise of its discretion to continue [petitioner] on parole, notwithstanding his apparent "satisfactory adjustment under parole supervision," in light of the trial judge's determination that a long period of parole supervision was required because of the serious nature of the charged crimes.

Ibid. In other words, "[c]onsideration of the effect of the removal of the special parole requirement from [petitioner's] sentence on his complete rehabilitation was an appropriate case specific reason to continue [petitioner] on parole * * *." *Ibid.*

Second, the court of appeals dismissed petitioner's contention that he was denied the right to be represented by counsel at his parole revocation hearing in July 1985 as the result of coercion and misrepresentation by petitioner's case manager. After reviewing the record, which showed that petitioner "insiste[d] on proceeding without counsel," in spite of his attorney's earlier request to attend the hearing, the court concluded that petitioner's "insistence on proceeding without counsel constituted a free, knowing and intelligent waiver." Pet. App. 12.

Finally, the court of appeals rejected petitioner's claim that the Parole Commission "violated his statutory rights when it based its determination not to terminate his parole in 1982 on information which was not accessible to him," Pet. App. 13, and it rejected his claim that because the Commission failed to give him advance notice of that information before his July 1985 revocation hearing, petitioner is entitled to a new hearing.

Under 28 C.F.R. 2.55(c)(2) and (3), information considered at a parole hearing may be withheld from the prisoner if it contains "[m]aterial which would reveal a source of information obtained upon a promise of confidentiality" or if disclosure of the information might cause harm. Here, the court of appeals found, the record showed that "certain information was deleted from the probation officer's reports because it contained the identity of a confidential informant." Pet. App. 14. Accordingly, the court concluded that "[t]his material was properly deleted under 28 C.F.R. § 2.55(c)." *Ibid.*

Moreover, under 28 C.F.R. 2.34(f), "[t]he evidence upon which the rescission hearing is to be conducted shall be disclosed to the prisoner *upon request*, subject to the exemptions set forth at § 2.55" (emphasis added). In this case, the court of appeals noted that petitioner had not requested the material at issue until April 1985, four years after the Parole Commission made its decision. The court therefore held that petitioner was not entitled to a new revocation hearing. Pet. App. 13-14.

ARGUMENT

Because parole has been abolished in the federal system, the issues petitioner raises are of no continuing importance. In the Sentencing Reform Act of 1984, Pub. L. No. 98-473, §§ 218(a)(5), 235, 98 Stat. 2027, 2031-2033, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728, Congress repealed the federal parole laws, effective as of November 1, 1987. The Sentencing Reform Act provides that the parole statutes and regulations will continue to apply to prisoners who committed crimes before November 1, 1987, but only until November 1, 1992. Pub. L. No. 98-473, § 235(b)(1)(A), 98 Stat. 2032. Consequently, the issues presented in this case

will be of diminishing importance over the next three years and of no importance whatsoever after that. For that reason, the issues raised by petitioner, which involve the administration of the federal parole system, do not warrant this Court's review.

1. Petitioner contends (Pet. 26-29) that the court of appeals erred in concluding that the original sentencing court's elimination of the special parole term, as required by *Bifulco*, is a "case-specific factor[ ]" under 28 C.F.R. 2.43(e) that supported the Commission's refusal to terminate parole in 1981. As the court of appeals pointed out, however, 28 C.F.R. 2.43(e)(1) and (2) expressly provide that the Commission "is not required to consider early termination of parole if there are case specific factors that caution against cessation of supervision." Pet. App. 9; see note 4, *supra*. Here, the record showed that "the trial judge intended that supervision of [petitioner] continue for four years *after* the Parole Commission terminated his regular parole," Pet. App. 9, although the intervening *Bifulco* decision required the elimination of the previously imposed special parole term. Indeed, the Commission "was advised of the district court's concern that [petitioner] serve an extended period of time on parole on June 1, 1980 and June 1, 1981." *Id.* at 10. Under these circumstances, the court of appeals correctly determined that the "[c]onsideration of the effect of the removal of the special parole requirement from [petitioner's] sentence on his complete rehabilitation was an appropriate case specific reason to continue [petitioner] on parole * * *." *Ibid.*[5]

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[5] Petitioner errs in suggesting (Pet. 28) that 28 C.F.R. 2.43(e)(2) defines the term "case-specific factors" to include only the parolee's "current behavior" or "background." Section 2.43(e)(2) provides that "case-specific factors may relate to the current behavior of the parolee * * *

2. Petitioner also renews his contention (Pet. 11-20) that he was denied the right to be represented by counsel at his parole revocation hearing in July 1985 as the result of coercion and misrepresentation by his case manager. A review of the record confirms that the court of appeals correctly rejected petitioner's fact-specific claim.

a. After FBI agents arrested petitioner in San Diego in connection with the outstanding narcotics indictment and the parole violation warrant, the Parole Commission scheduled a parole revocation hearing, which took place on July 16, 1985. On July 12, petitioner's attorney sent a let-

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or to the parolee's background * * *." See note 4, *supra*. The regulation's express terms thus do not so limit the Commission's consideration of case-specific factors. Moreover, a parolee's "background" may well include the particular procedural context surrounding his initial sentencing.

Petitioner contends alternatively that the court of appeals erred in upholding the Commission's decision because "[t]he Parole Commission did not consider the elimination of the special parole term." Pet. 29. The record refutes this claim. As the court of appeals noted, the probation officer "recommended against early termination of the parole term set by the Parole Commission [because petitioner had an outstanding committed fine] and [also] alerted that body that the four-year special parole term had been deleted because of the Supreme Court's opinion in *Bifulco*." Pet. App. 7. The case analyst, however, advised the Commission that the fine was not a valid reason to continue petitioner on parole. Pet. App. 9. And, the year before (1980), the Commission had considered terminating petitioner's parole so that he could begin his four-year special parole term. E.R. 88. Consequently, when the Parole Commission "agreed with the recommendation of the case analyst and the probation officer without comment," Pet. App. 8, the court of appeals reasonably concluded that the Commission continued petitioner on parole in 1981 because of the intervening elimination of the special parole term.

ter to an Assistant United States Attorney notifying him that defense counsel would be out of the country on the scheduled date for petitioner's hearing. That letter further advised the prosecutor that the hearing should be postponed in his absence:

> Because I am familiar with the case and the basis for the parole revocation my client Montana Horner and I feel it is imperative that I be present at any parole revocation hearing. It is mandatory under 18 U.S.C. 4214(c) that his hearing be conducted within 90 days, but I have spoke[n] with representatives of the Regional Office and indicated to them that my client would wish this hearing continued in order that I could be present. The hearing will be held and my client will have to request a continuance by himself, for I will be out of the country after today.

Pet. App. 11; E.R. 123.

On July 15, 1985, according to petitioner's account (which the district court and the court of appeals accepted), petitioner told the case manager that his attorney was out of the country. The case manager urged petitioner to proceed with the parole revocation hearing without counsel or "stay here in lockdown for two months until the parole hearing officers come back in September." Pet. App. 12. The case manager advised petitioner that "a guy often gets more time when he brings his attorney" and that if petitioner insisted on being represented by counsel, he would receive "a local Mexican attorney." *Ibid.* The case manager also told petitioner that he would be released on parole after serving an additional 24 to 36 months in confinement. After speaking to his lawyer's partner, the case manager advised petitioner that the partner had agreed that petitioner should proceed without counsel. The partner, however, had not told the case manager that petitioner should proceed with the hearing. *Ibid.*

The following day, July 16, the parole hearing examiner panel advised petitioner of his right to counsel and asked if he had had sufficient time to prepare for his case and confer with his attorney. The examiner panel then read defense counsel's July 12 letter to the Parole Commission, which it had recently received. The panel showed petitioner the letter and specifically asked him if he still wished to proceed without his attorney. Petitioner responded by "insist[ing] [that the examiners] go forth with the revocation hearing without his attorney present." E.R. 118; see *id.* at 64, 122; Gov't C.A. Br. 5-8.

b. Under these circumstances, the court of appeals, while sharply critical of the case manager's conduct, nonetheless correctly held that petitioner knowingly and voluntarily waived his right to be represented by counsel. The court concluded that "[t]he case manager's inappropriate and erroneous advice was sufficiently attenuated by the lapse of time, the special caution exhibited by the hearing examiners to determine whether [petitioner's] written waivers of counsel should be accepted, and [petitioner's] decision to proceed without his counsel notwithstanding his attorney's recommendation that he seek a continuance." Pet. App. 12-13. Indeed, the hearing examiners' questioning was specifically "aimed at allowing [petitioner] to express any reservations he had about waiving counsel." *Id.* at 13. Moreover, the record does not suggest (and petitioner does not argue) that any statement he made before the examiners was coerced or involuntary.[6]

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[6] Petitioner contends that "[t]he case manager's estimate of 24-36 months confinement was pivotal to [his] waiver of counsel * * *." Pet. 17-18. Petitioner, however, scarcely bared his soul to the case manager. As the court of appeals pointed out, petitioner had not told the case manager that "he was involved in distributing about twelve ounces of cocaine per month for a two-year period." Pet. App. 13. Accordingly, "[n]o misrepresentation occurred," *ibid.*, and petitioner could not have reasonably relied on the case manager's statement.

Nevertheless, petitioner claims that the court of appeals "had no basis to make the factual finding of dissipated taint and an effective waiver of counsel" where the record is "devoid of an evidentiary hearing." Pet. 13. Petitioner, however, did not raise this issue before the court of appeals, and he has therefore not preserved it for review. *E.g., United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the record in this case rendered an evidentiary hearing unnecessary. Petitioner executed no fewer than three separate documents stating that he wished to waive his right to counsel, each of which confirmed that petitioner knowingly decided to make that choice. See E.R. 70; Gov't C.A. Br. 17. A summary of the revocation hearing further documented petitioner's considered decision. That summary noted that petitioner "has submitted the proper forms indicating he does not wish to request appointment of counsel, does not wish to have an attorney present for the revocation hearing, and has no voluntary witnesses." E.R. 118. The summary further noted that "this issue was discussed in detail with [petitioner] as we did have a copy of a letter from [petitioner's] attorney * * * wherein he indicated that he wished to be present for his client's revocation hearing." *Ibid.*[7] And the summary explained that "[i]n spite of the letter * * * [petitioner] insisted [the panel] go forth with the revocation hearing without his attorney present." *Ibid.* In light of this documentary record, there was no need for the court of appeals to remand the case for an evidentiary hearing. See *Widgery* v. *United States*, 796 F.2d 223, 224 (8th Cir. 1986).[8]

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[7] Petitioner conceded that the panel read the letter to him. See E.R. 64.

[8] Despite petitioner's suggestion, the affidavit he submitted in support of his motion for a writ of habeas corpus did not raise any material

3. Lastly, petitioner renews his contention (Pet. 21-26) that the Parole Commission violated 18 U.S.C. 4208(b) when it refused to terminate his parole in 1982 based on information supposedly inaccessible to petitioner, and that the Commission's failure to give him advance notice of such information before his July 1985 revocation hearing requires that he receive a new hearing.

Petitioner's claims are meritless. First, with respect to petitioner's challenge to the Parole Commission's failure to disclose information in 1982, 18 U.S.C. 4208(b)(2) requires that a prisoner be granted "reasonable access to a report or other document to be used by the Commission in making its determination," but this mandate does not apply to "any document which reveals sources of information obtained upon a promise of confidentiality," 18 U.S.C. 4208(c)(2), or to "any other information which, if disclosed, might result in harm, physical or otherwise, to any person," 18 U.S.C. 4208(c)(3). As both the district court (Gov't C.A. Br. 27) and the court of appeals determined, the govern-

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issue of fact warranting an evidentiary hearing. In that affidavit, petitioner stated that he agreed to waive counsel because the case manager had falsely given him the "impression" that his attorney's partner had said that petitioner "should now go to the parole hearing." E.R. 63-64. But as the court of appeals pointed out, the hearing examiners' "questioning was aimed at allowing [petitioner] to express any reservations he had about waiving counsel," and the examiners' "caution was both appropriate and sufficient, given that [petitioner] apparently was not willing to disclose the case manager's advice." Pet. App. 13. In fact, petitioner conceded in his affidavit that when he read defense counsel's July 12 letter at the start of the July 16 hearing, that letter "clearly sounded as if [petitioner] should not go to the Parole Commission * * *." E.R. 64. In this situation, the court of appeals could reasonably conclude that petitioner would have discussed the case manager's advice with the hearing examiners if he had had any doubts about his right to counsel, especially where the examiners had discussed that right with petitioner "in detail." E.R. 118.

ment properly withheld certain DEA documents from petitioner because they revealed the identity of a confidential informant, disclosure of which "might have resulted in harm to the informant." Pet. App. 14; see E.R. 52.[9]

Petitioner nonetheless asserts (Pet. 23-24) that the Parole Commission should have provided him with a summary of the information without disclosing the identity of the confidential informant. That claim rings hollow. The governing regulation makes clear that "[t]he evidence upon which the rescission hearing is to be conducted shall be disclosed to the prisoner *upon request* * * *." 28 C.F.R. 2.34(f) (emphasis added). And, as the court of appeals determined, petitioner did not request the documents until April 1985, four years after the Parole Commission made its decision. Pet. App. 13-14.[10]

Second, with respect to petitioner's principal claim that the Commission improperly withheld information used at the 1985 revocation hearing, the record shows that the Commission's limited use of the withheld DEA documents did not prejudice him. The Commission primarily relied on petitioner's own admissions to rate his offense; the Commission considered DEA documents only to the extent that they

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[9] The record shows that the Commission forwarded these documents to the DEA for processing under the Freedom of Information Act and the Privacy Act. The DEA was supposed to contact petitioner directly regarding disclosure of the documents. After petitioner initiated this habeas corpus action, the Commission obtained authorization and disclosed unredacted copies of the documents to petitioner. See Gov't C.A. Br. 27.

[10] Petitioner errs in contending (Pet. 24) that 28 C.F.R. 2.34 conflicts with 18 U.S.C. 4208. The regulatory requirement that a prisoner first make a request for specific information is consistent with the statutory mandate that the Commission provide a prisoner "reasonable" access to the information. See 18 U.S.C. 4208(b). Such a common triggering mechanism reduces unnecessary administrative costs. See also 18 U.S.C. 4203(a)(1).

corroborated petitioner's statements. See E.R. 127-128. Furthermore, by the time of the special parole revocation rehearing in December 1985, petitioner was already aware of the substance of those documents. See E.R. 41, 57, 64-65, 125, 127-128.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

MONTANA HORNER,

Petitioner,

v.

UNITED STATES PAROLE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

INTRODUCTION. 1

REASONS FOR ALLOWANCES OF THE WRIT. . . . 4

A. THE COERCED AND FRAUDULENTLY PROCURED WAIVER OF COUNSEL BY THE CASE MANAGER THE DAY BEFORE AND THE DAY OF THE PAROLE HEARING FROM THE CONFINED INCOMMUNICADO PAROLEE WAS NOT DISSIPATED BY THE PAROLEE'S RESTATEMENT OF THE WAIVER BEFORE THE PAROLE COMMISSION. . . . 4

B. PETITIONER, A PAROLEE, WAS DENIED REASONABLE ACCESS TO ADVERSE INFORMATION BEFORE PAROLE HEARING IN VIOLATION OF 18 U.S.C. 4208(b) AND **U.S. DEPARTMENT OF JUSTICE V. JULIAN**, 108 S.CT. 1606 (1988). 8

C. THE SPECIAL TERM REMOVAL UNDER **BIFULCO** WAS NOT A "CASE SPECIFIC FACTOR" THAT EXCUSED REQUIRED EARLY TERMINATION OF PAROLE. . . 10

CONCLUSION. 12

TABLE OF AUTHORITIES

Cases	Page
Bifulco v. United States, 447 U.S. 381 (1981)	10
Edwards v. Arizona, 451 U.S. 477 (1981)	2
Machibroda v. United States, 368 U.S. 487 (1962)	3,5
Massiah v. United States, 377 U.S. 201 (1964)	
Taylor v. Alabama, 457 U.S. 687, 690 (1982)	8
U.S. Department of Justice v. Julian, 108 S.Ct. 1606, 1612 (1988)	8,9

Statutes and Regulations	Page
18 U.S.C. 4211(b)	11
28 C.F.R. 2.43(e)(2)	11
46 Fed. Reg. 28648-9 (28 May 81)	11

IN THE

SUPREME COURT OF THE UNITED STATES

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Respondent.

REPLY BRIEF

The Government's attempt to shift the focus of the serious questions presented for review[1] fails to address the interference of the Sixth Amendment and statutory right to counsel during a federal criminal case (after plea and before sentence) during a parole

[1] The rephrasing and the reordering of the Questions Presented (Govt. Opp. (I)) dilutes the denial of counsel at the parole revocation hearing and the failure to afford even fundamental due process as well as statutory compliance with notifying the confined parolee of what adverse information would be used against him. When Congress directs a federal agency, the Parole Commission, to grant rights to prisoners, under our Constitution the federal courts must "check" the overreaching of the Executive Agency.

revocation proceeding in a federal prison. This Court enforces the right to counsel prior to charge (**Edwards v. Arizona**, 451 U.S. 477 (1981)) and after the charge (**Massiah v. United States**, 377 U.S. 201 (1964), yet the Government fails to evaluate the central question recognized by the Court of Appeal: Was the acknowledged defective waiver of counsel attenuated?[2]

Today there are approximately 56,000 federal prisoners, and a fair estimate would indicate more than half would be subject to "old law" sentences with included parole terms.[3] The projected demise of the Parole Commission is premature and offset by "Ex post

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[2] The Government repeats the factually unsupported conclusion of the Court of Appeals (Opp. 13) without statement or analysis of the precedent of this Court, i.e., **Wong Sun v. United States**, 371 U.S. 471, 491 (1963) et al. (Pet. 19-20).

[3] Although the "new law" (Sentence Reform Act of 1984) sentences were to be effective 1 November 1987, over half of the federal district judges had found them unconstitutional. On 18 January 1989, this court rejected several attacks on the constitutionality of the "new law" sentences (**Mistretta v. United States**, 109 S.Ct. 647), but up to then many "old law" sentences were imposed and are still intact.

Facto" concerns and a burgeoning prison population, which may require Congressional reconsideration of parole for "new" and "old law" sentences. The real constitutional issue is whether the Sixth Amendment right and access to counsel withers in a prison and may be undermined by a fraudulent and coerced waiver.

STATEMENT OF THE CASE

The Government contends that the request for an evidentiary hearing was not raised in the Court of Appeals (Opp. 14). Wrong. Petitioner in the Brief for Appellant in the Court of Appeals ("The Supreme Court required that a hearing be held on these allegations...." 24-25) and expressly cited and relied on **Machibroda v. United States**, 368 U.S. 487 (1962)(hearing required on voluntariness of plea even with affidavit of prosecutor denying petitioner's allegations of coercion). In the Petition for Rehearing (page 14) filed in the

Court of Appeals the petitioner "requests the judgment be modified to direct an evidentiary hearing on Reasons A and B [Questions Presented No. 1 and 2]." The denial of a hearing was clearly before the Court of Appeals.

REASONS FOR ALLOWANCE OF THE WRIT

A. THE COERCED AND FRAUDULENTLY PROCURED WAIVER OF COUNSEL BY THE CASE MANAGER THE DAY BEFORE AND THE DAY OF THE PAROLE HEARING FROM THE CONFINED INCOMMUNICADO PAROLEE WAS NOT DISSIPATED BY THE PAROLEE'S RESTATEMENT OF THE WAIVER BEFORE THE PAROLE COMMISSION.[4]

The Government contends "Moreover, the record does not suggest (and petitioner does not argue) that any statement he (petitioner) made before the examiners was coerced or involuntary." (Opp. 13). That claim is error. Petitioner's contention, supported by the record and the appellate finding of the case manager's misconduct, was that the counsel waiver of the petitioner before the parole

[4] This section corresponds to Argument 2 (pp. 11-14) in the Opposition.

examiners was the direct product of the coercion and programming of the case manager. The situation was analogous to **Machibroda, supra,**[5] in which the judge took an apparently voluntary plea of guilty three days after the defendant had allegedly made a deal with the prosecutor that he would receive no more than 20 years. The prosecutor had told the defendant not to mention the deal to his attorney. The district court imposed a 40-year sentence and denied an evidentiary hearing on the post-conviction petition challenging the voluntariness of his plea (waiver). This Court directed that given the specific factual allegations an evidentiary hearing was required.

The conduct of the case manager is far more egregious than that of the prosecutor in **Machibroda.** He usurped the role of the

[5] Although **Machibroda** was discussed and relied upon in the Petition (15), it was not mentioned in the Opposition.

attorney and threatened petitioner with adverse consequences: continuation in lock-up, additional time if represented by an attorney, and substandard representation by Mexican attorney if counsel was demanded, and lied about his contact with Attorney Sevilla, who had emphasized that petitioner should not waive counsel. Like the prosecutor, he promised a good deal: release in 24-36 months. On the charge specified in the notice of revocation this was a fair estimate, and the petitioner relied on these representations of the case manager when he waived his attorney before the examiners. The case manager substitution as attorney was complete when he advised the petitioner to be completely open and candid because his honesty could only help him, a waiver of his Fifth Amendment privilege which had disastrous consequences for him.[6]

[6] The Government suggests that the petitioner should be penalized for not bearing his soul to the case manager of possible charges not related to those that served as the basis for

The Government argues that the petitioner signed three separate waivers of counsel (Opp. 14), but the Court of Appeals recognized that they were the product of inappropriate and erroneous advice. (Pet. App. 6474-6475).

Given the admitted facts, which includes the possibility the case manager was present at the parole hearing,[7] the continuous influence of the case manager corrupted the waiver before the parole examiners. Without an evidentiary hearing it cannot be found that

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revocation ((1) San Diego offense [April 1982], (2) failure to report change of residence, and (3) failure to submit monthly supervision reports (ER 118-119). (Opp. 13 n.6). The case manager who had access to the records on the petitioner before the hearing was able to formulate an opinion of the probable parole release date. If the opinion was given without limitation or inquiry of the petitioner, the petitioner acted reasonably in relying on it. The petitioner was never apprised, especially in the incommunicado status and without access to a lawyer seeking his interest, that extrinsic evidence would be considered. The parole examiners did in fact rely on extrinsic information, and the case manager, if he had access to that information, was making even more serious misrepresentations to get the petitioner to waive counsel. The protracted speculation by both the Government and the Court of Appeals demonstrates in this fact specific case there should have been an evidentiary hearing.

[7] Although not in the record, it is normal procedure for the case manager to be present at parole revocation proceedings.

the admitted "primary taint" was purged. **Taylor v. Alabama**, 457 U.S. 687, 690 (1982).

B. PETITIONER, A PAROLEE, WAS DENIED REASONABLE ACCESS TO ADVERSE INFORMATION BEFORE PAROLE HEARING IN VIOLATION OF 18 U.S.C. 4208(b) AND U.S. DEPARTMENT OF JUSTICE V. JULIAN, 108 S.CT. 1606 (1988).[8]

The statute (18 U.S.C. 4208(b)) states that "[a]t least thirty days prior to any parole determination proceeding, the prisoner shall be provided with ... (2) reasonable access to a report or other document to be used by the Commission in making its determination." Congress placed the duty to disclose on the Parole Commission. **U.S. Department of Justice v. Julian**, 108 S.Ct. 1606, 1612 (1988), but the Government contends that the regulation requiring a request (Opp. 16) (it is not known from the record whether one was made) precludes the invocation of this statutory right in the

[8] This section corresponds to Argument 3 (pp. 15-17) in the Opposition.

context of this case where the prisoner was unexpectedly removed from a local detention facility (San Diego MCC) to a distant penitentiary (Lompoc, California) four days before the hearing. The surprise hearing was aggravated by the surprise evidence, which controverted both letter and spirit of the statute.

The parole examiners certainly considered the nondisclosed adverse information in the questioning of the petitioner's non-charged misconduct. Petitioner's admissions confirmed the non-disclosed misconduct for which the prisoner did not have an opportunity to prepare himself.

The Government contends the defective notice of the non-disclosed information at the July 1985 parole revocation hearing was cured by the December 1985 special reconsideration hearing. (Opp. 16-17). The Parole Commission ordered the reconsideration hearing solely to determine the impact of the sentence imposed

by the San Diego federal court after the July 1985 parole revocation hearing. The December 1985 examiners relied upon the same information and determination made in July 1985. This did not cure the error. It reiterated the mistakes of the earlier hearing. The petitioner was entitled to access the adverse information at the time it would have been useful to him.

C. THE SPECIAL TERM REMOVAL UNDER BIFULCO WAS NOT A "CASE SPECIFIC FACTOR" THAT EXCUSED REQUIRED EARLY TERMINATION OF PAROLE.[9]

The Government contends that the original sentencing judge intended an illegal sentence. Under **Bifulco** the judge was not authorized by statute to impose a term of special parole on a conspiracy. In this case the judge imposed a special term only one year above the minimum required for substantive offenses.

The Parole Commission was bound by its

[9] This section corresponds to Argument 1 (p. 10) in the Opposition.

regulations,[10] which implemented a statutory (18 U.S.C. 4211(b)) policy of early termination of parole supervision. Research had established that most violations occur in the first two years on parole. 46 Fed. Reg. 28648-9 (28 May 81).

The Commission circumscribed its discretion and defined "case specific factors" relating to the parolee's current behavior or background. (28 C.F.R. 2.43(e)(2); Opp 7 n.4). The invalidation of the special parole term was not within the consideration of the parole regulation, and it was mentioned by the probation/parole officer, but not relied upon by the Commission in its extension of his parole beyond the three-year regulatory limit (April 1981). When the parole violation was charged in 1982, four years after release on parole, the Commission no longer had jurisdic-

[10] United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954).

tion. It is not appropriate to construct jurisdiction through appellate hindsight.

CONCLUSION

For the reasons set forth in the Petition and this Reply, this Court should grant a writ of certiorari to review the judgment of the court of appeals denying the evidentiary hearing and the writ of habeas corpus.

Respectfully submitted,

2 November 1989

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